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ABSTRACT

This document outlines the affirmative action that has evolved as the result of attempts to eliminate discrimination in federal employment and in federal contracts. The following acts are discussed: (1) Federal Executive orders; (2) Title VI of the Civil Rights Act of 1964; (3) Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; (4) Titles VII and VIII of the Public Health Service Act; (5) Equal Pay Act of 1963 as amended by the Education Amendments of 1972; (6) Title IX of the Education Amendments of 1972 (Higher Education Act); (7) State Anti-Discrimination Laws, citing judicial decisions and interpretations of various federal laws. Agencies and organizational resources dealing with civil rights are listed with their addresses. (JD)

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Affirmative Action in Employment

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A HISTORICAL OVERVIEW OF THE ORIGIN AND FOUNDATION OF AFFIRMATIVE ACTION IN EMPLOYMENT

Many individuals have come to believe that affirmative action as a means of improving equal employment opportunities has evolved as an outgrowth of the civil rights movement of the '50's and '60's. This concept, an integral part of personnel management, however, can be traced back to the 1930's. Affirmative action has evolved as the result of numerous attempts to eliminate discrimination in federal employment and in federal contracts. At the present time, there are six bodies of law with corresponding precedents that support affirmative action in employment:

1). federal executive orders

2). federal anti-discrimination laws

3). state anti-discrimination laws

4). judicial decisions

5). laws regulating collective bargaining agreements

6). institutional policies prohibiting discrimination

The relationship of any one of these to some particular situation is determined by a number of situational variables. The next section delineates each of these in order that a general framework for the consideration of affirmative action might be provided.

Federal Executive Orders

The first efforts to reduce discrimination in employment originated with the implementation of federal executive orders prohibiting discrimination in companies holding federal contracts. Black civil rights leaders worked for years to move the federal government toward a policy of non-discrimination. One of the early Executive Orders prohibiting discrimination was issued by President Franklin D. Roosevelt in June, 1941. Additional orders subsequently

issued attempted to strengthen and extend coverage of the prohibition of discrimination. A chronology of the Executive Orders issued and a summary of their evolution is provided in Table 1.

TABLE 1

CHRONOLOGY OF FEDERAL EXECUTIVE ORDERS

	Measure	Requirement Action	Date
1.	Executive Order 8802 Pres. Franklin D. Roosevelt	Established a Committee on Fair Employment Practices to investigate discrimination complaints in companies holding defense contracts.	June, 1941
2.	Executive Order 9346 Pres. Franklin D. Roosevelt	Expanded Committee's jurisdiction to "war industries" and specified contract clause of "non-discrimination in hire, tenure, terms or conditions of employment or union membership in all government contracts.	May, 1943
3.	Executive Order 10308 Pres. Harry S. Truman	Established Committee on Government Contract Compliance to receive, investigate complaints; and supervise the actions of agencies responsible for non-discrimination in federal contracts.	
4.	Executive Order 10479 and Order 10557 Pres. Dwight D. Eisenhower	Established new Government Contract Compliance Committee to be chaired by Vice-President. Expanded non-discrimination obligations of the employer to "employment, upgrading, demotion, or transfer, recruitment advertising; layoff or termination; rates of pay and other forms of compensation and selection for training." Employers required to post notices of obligations.	August, 1953 September, 1953
5.	Executive Order 10590 Pres. Dwight D. Eisenhower	Established President's Committee on Government Employment Policy which became involved with training and motivation of minority group workers.	January, 1955

Measure	Requirement Action	Date
6. Executive Order 10925 and Order 1114 Pres. John F. Kennedy	Established President's Committee on Equal Employment Opportunity which was made responsible for eliminating discrimination in federal government employment. First order with enforcement provisions. Extended authority to federally assisted construction and provision for contract debarment for non-compliance. 1114 extended coverage to federally aided construction projects.	1961
7. Executive Order 11246 and Order 11375 Pres. Lyndon B. Johnson	Assigned contract compliance to Secretary of Labor, who established Office of Federal Compliance. Required that all contractors (over $10,000) take affirmative action and required that such action cover all of contractor's operations.	September, 1965
	Order 11375 amended 11246 to prohibit discrimination on the basis of sex and include affirmative action to ensure hiring without regard to sex. Specifies non-discrimination in employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other compensation; and selection for training.	October, 1967 (Effective 1968)
8. Executive Order 11478 Pres. Richard M. Nixon	Amends 11246 by prohibiting discrimination based on race, sex, color, religion or national origin in federal employment. Directs executive departments and agencies to establish and maintain affirmative employment programs.	August, 1969
9. OFCC Guidelines for Executive Order 11246	Specific affirmative action which included identification and analysis of "problem areas," prescribed use of goals and timetables. Detailed penalities and procedures for non-compliance.	December, 1971

Measure	Requirement Action	Date
10. Order No. 4 and Revised Order 4 for Executive Order 11246	Extended specification of affirmative action plan and penalities and procedures for non-compliance	1970
11. Revised Order 14 for Executive Order 11246	Further specification of an affirmative action plan, procedures for non-compliance review, and citizen's access to information.	May, 1974

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI of the Civil Rights Act prohibits discrimination on the grounds of race, religion, or national origin by education programs receiving federal funds. This legislation provides coverage for students and others; employment practices and policies are exempted from coverage. If any program of an institution receives federal funds, all activities of the institution related to the program are covered. When institutional aid funds are involved, all activities of the institution are covered.

Complaints of discriminatory practices that violate Title VI should be made to:

Office of the Secretary
U.S. Department of Health, Education & Welfare
Washington, D.C. 20201

If discriminatory practices are found, informal conciliation with the institution is initiated by HEW. Should this fail, the federal government may delay new funds, revoke current funds, and disqualify the institution from eligibility for future program funds. The U.S. Department of Justice may file suit at HEW's request.

Complaints are kept confidential if possible. If court action becomes necessary, the identity of both parties becomes public information. Institutions are prohibited from discharging or discriminating against any person or group making a complaint assisting in an investigation, or instituting proceedings.

Title VI's primary application in education programs is to discrimination in student admissions, program content, and institutional practices on the basis of race or ethnic group. It may be used in cases of individual discrimination or pattern discrimination against a group or class.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

As Amended By The Equal Employment Opportunity Act of 1972

Title VII of the Civil Rights Act prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. It provides comprehensive prohibition of anti-discrimination in employment and is the basis of a body of precedents and litigation. All institutions with 15 or more employees, including state and local governments, school systems, and labor organizations, are covered under the amended act. Title VII prohibits all discriminatory practices in all conditions of employment such as:

-- Recruitment, selection, assignment and transfer, layoff, discharge and recall

-- Opportunities for promotion

-- In-service training opportunities

-- Wages and salaries

-- Sick leave time and pay

-- Vacation time and pay

-- Overtime work and pay

-- Medical, hospital, life and accident insurance

-- Retirement plans and benefits

-- Other staff benefits

Complaints of discriminatory employment practices that violate Title VII are made to:

Equal Employment Opportunity Commission
1800 G Street, N.W.
Washington, D.C. 20506

or to a regional EEOC office. The complaint may be initiated by a letter outlining the nature of the complaint and documenting the charge if possible. The EEOC will notify the employer against whom the complaint was filed within ten (10) days and make an investigation. If discriminatory policies or practices

are found, EEOC will attempt informal conciliation. Should this attempt fail, EEOC or the U.S. Attorney General may file suit. The aggrieved party may also initiate a suit if action has not been taken after obtaining a right to see letter from EEOC. The court of jurisdiction may then order such actions as the discontinuance of unlawful practices, appropriate affirmative action, reinstatement of employees, and/or the awarding of back pay.

Persons or organizations filing complaints under Title VII are identified when the employer is notified of the complaint. The employer is prohibited from discharging or discriminating against an employee because he or she has filed a complaint, assisted an investigation, or initiated court action. Charges are not made public by EEOC, nor is any of the conciliation process divulged. When a court action becomes necessary, the identity of the parties involved becomes a matter of public record. The complainant and the institution are not bound by the confidentiality requirement.

TITLE VII (SECTION 799A) AND TITLE VIII (SECTION 845) OF THE PUBLIC HEALTH SERVICE ACT

Titles VII and VIII of the Public Health Service Act state that institutions receiving federal funds for their health personnel training programs may not show sex discrimination in admissions or in employment practices relating to employees working directly with applicants or students. Every institution receiving or benefiting from a grant, loan guarantee, or interest subsidy to its health personnel training programs or receiving a contract under Title VII or VIII is covered.

Complaints of Title VII and VIII violations should be made to:

Office for Civil Rights
U.S. Department of Health, Education And Welfare
Washington, D.C. 20201

or nearest regional HEW office.

Schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, allied public health personnel, and nursing are specifically mentioned in the legislation. The intent of the legislation is to break down the institutional barriers that restrict the participation of both males and females in areas traditionally dominated by one sex.

Regulations for the enforcement of the law have not been finalized. In view of the precedents developed through other anti-discrimination legislation the following procedures may be anticipated.

The federal government may investigate educational institutions on a periodic review basis as well as in response to complaints. Any unit of the institution related to health personnel training programs, whether or not it receives direct federal assistance, may be investigated.

When complaints are received, the identity of the complaint will be kept confidential if possible. Neither the institution nor the complainant will be required to maintain confidentiality. The institution will be prohibited from

discharging or discriminating against anyone making a complaint, assisting an investigation, or instituting proceedings.

If, upon review or investigation, it is determined that an institution maintains discriminatory practices, the federal government may delay new awards, revoke current awards, and/or disqualify the institutions from eligibility for future awards. HEW may also request the Department of Justice to bring suit against the institution.

EQUAL PAY ACT OF 1963

As Amended By The Education Amendments Of 1972
(Higher Education Act)

The Equal Pay Act prohibits sex discrimination in employee salaries and fringe benefits. All workers, including those in professional, executive, and administrative positions in education, are currently covered by the Equal Pay Act. The Act provides that a man and a woman working for the same institution under similar conditions in jobs requiring substantially equivalent skill, effort, and responsibility must be paid equally. Job titles and assignments do not have to be identical. Bona fide merit and seniority systems that result in pay differentials are allowed, so long as the systems themselves do not discriminate on the basis of race or sex.

Employers are required to maintain specified records relevant to the determination of whether possible violations have occurred. The federal government has the power to review all relevant records periodically even if no violation has been reported.

The complaint procedure is relatively informal. Complaints may be filed with:

Wage and Hour Division
U.S. Department of Labor
Washington, D.C. 20210

or to the nearest regional office of the Department of Labor. A complaint may be made in person, by letter, or by telephone. The identity of the complainant is not revealed by the government during the investigation process; however, neither the employer nor the complainant is bound by the confidentiality requirement.

The employer is first given opportunity for voluntary compliance with the law. More than 95 percent of all EPA investigations are resolved quickly in this manner. If the employer does not comply voluntarily, the Secretary of Labor or the aggrieved party may file suit. The identities of the employer

and the complainant then become a matter of public record. The court may order the employer to discontinue unlawful behavior, increase salaries, and pay back wages and interest. Employers are prohibited from discharging or discriminating against any employee who has made a complaint, assisted with an investigation, or initiated court proceedings.

The Equal Pay Act also prohibits labor organizations from causing or attempting to cause employers to discriminate on the basis of sex. Complaints and suits may be filed against labor organizations that violate this provision.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

(Higher Education Act)

Title IX states, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Title IX is patterned after the race discrimination provisions of Title VI of the 1964 Civil Rights Act. It differs from Title VI's coverage in that it also covers prohibition of discrimination in employment on the basis of sex.

Nearly all local education agencies and institutions of higher education are covered. Religious institutions are exempt if application of Title IX is not consistent with their religious tenets. Military schools are exempt if their primary purpose is to train individuals for the U.S. military service or the merchant marine.

Complaints of sex discrimination in educational programs or educational employment should be made to:

Office of Civil Rights
U.S. Department of Health, Education and Welfare
Washington, D.C. 20201

or to the nearest regional HEW office. If possible, complaints are kept confidential by the government. The institution and the complainant are not required to maintain confidentiality.

Regulations governing the enforcement of the legislation are currently being finalized. The proposed regulations provide a general prohibition of sex discrimination in employment. They are unique in that specific prohibition against mandatory maternity leave and unequal retirement benefits are outlined. (Provisions covering admissions and treatment of students will be discussed in the later section on educational program/affirmative action.)

The government may force an agency or institution to comply with Title IX by delaying new funds, revoking current funds, and/or disqualifying the institution from eligibility for future funds. HEW may also ask the Department of Justice to bring suit.

STATE ANTI-DISCRIMINATION LAWS

The first state fair employment practice law was passed in New York in 1945. The New York law is significant in its comprehensiveness; a majority of the 36 other comprehensive state fair employment laws are patterned after this law as was the federal Civil Rights Act of 1964. Several states have weak or more limited legislation.[1]

State laws are typically identified as fair employment practice laws, and usually prohibit discrimination on the basis of race, color, national origin, religion, sex and age.

In Ohio, Section 4112.02 of the Ohio Revised Code, covers unlawful discriminatory practices where employment is concerned. Thirteen states also prohibit discrimination of handicapped persons.

Most state acts establish commissions for their enforcement. In Ohio, under Section 4112.03 of the Ohio Revised Code, the Ohio Civil Rights Commission, acting in concert with the Attorney General's Office, has this responsibility. These commissions are generally composed of three to twelve commissioners, usually appointed by the governor with legislative approval.

Rather standardized procedures have been developed for the filing of charges or the initiation of discrimination complaints. Most laws require that an individual or representing attorney file written charges with the commission. A few of the more progressive state laws allow commissions to initiate actions upon learning of discriminatory practices. After a complaint or charge has been filed, a commission investigates the complaint. A conference may be called between the involved parties. Effort is made to reconcile differences between the parties without resorting to legal action. If this fails, the commission may order a public administrative hearing.

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[1]See Joseph E. Champagne and Jane H. Lerner, Equal Employment Opportunity Under Federal and State Laws: A Guide to Laws ond Orders Prohibiting Discrimination in Employment. Houston: University of Houston, 1973.

During the hearing phase of the complaint process, the commission has the power to issue subpoenas and launch a full scale investigation. If a finding of discrimination is made, the commission has the power to issue cease and desist orders. Provisions are usually made to order hiring or reinstatement of an employee with or without back pay, and in some instances damages may be awarded.

The clear prohibition of employment discrimination in a growing body of state laws provides another basis for affirmative action.

Judicial Decisions

Judicial interpretations of various federal laws have extended the principles of affirmative action. The courts have generally required affirmative action from all employers when findings of discrimination have been made. Some of the key concepts that have established precedent for affirmative action are:

> Discrimination Against a Group or Class: Employment discrimination, by definition is class-wide discrimination. Where it is found to exist, action to eliminate it must apply to all members of the "affected class" to which an individual complainant belongs. The class discrimination concept has been broadly interpreted by the courts.[2]
>
> Employer Intent: It is the consequences of the employment practice, not the intent, which determines whether discrimination requiring remedial action exists.[3]

An employment practice or policy, however neutral in intent and however fairly and impartially administered, which has a "disparate effect" on members of a "protected class" (those groups specified in the law) or which perpetuates the effect of prior discriminatory practices, constitutes unlawful discrimination unless it is proved that such policy is compelled by "business necessity."[4]

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[2]Bowe v. Colgate Palmolive, 416 F. 2d 711, 721 (7th Cir. 1969); Jenkins v. United Gas Co., 400 F. 2d 28 (5th Cir. 1968); Blue Bell Boots v. EEOC, 418 F. 2d 355, (6th Cir. 1969).

[3]Griggs v. Duke Power Co., 401 U.S. 425 (1971).

[4]U.S. v. Hayes International Corp., 456 F. 2d 112, 118 (5th Cir. 1972).

Determination of Discrimination: Statistics, such as highly disproportionate representation of minorities or females in any job classification in relation to their presence in the population or work force, constitute strong evidence of discriminatory practices. Where such statistics exist, the burden of proof is on the employer to show that they are not the result of overt or institutional discrimination.[5]

The concepts conveyed in these judicial decisions provide the foundation for affirmative action. When a statistical survey shows that racial and ethnic minorities and females are not participating in an institution's or agency's work force at all levels in relations to their presence in the relevant labor pool, the burden of proof is on the employer to show that this is not the result of discrimination, however inadvertent.

The employer is not required to hire unqualified personnel nor impose arbitrary quota systems to achieve proportional statistical representation. What is required is the demonstration of good faith efforts to ensure true equality of employment opportunity regardless of race, color, national origin, or sex.

Judicial interpretation of the requirements were summarized by Justice Burger:

> *What is required . . . is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissable classification.*[6]

The barriers that were identified by the Supreme Court and many other courts include various practices and policies of recruitment, selection, placement, testing, systems of transfer, promotion, seniority, lines of progression, and many other basic terms and conditions of employment.

Judicial decisions regarding numerous issues presently being litigated in the courts will continue to specify the coverage, procedures, and requirements for affirmative action.

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[5]United States v. Ironworkers Local 86, 443 F. 2nd 544, 550-551 (9th Cir. 1971), cert. den. 404 U.S. 984 (1971): United States v. United Brotherhood of Carpenters and Joiners, Local 169, 457 F. 2d 210, 214 (7th Cir. 1972).

[6]Griggs v. Duke Power Co., supra p. 431.

Collective Bargaining Laws and Agreements: The primary experience base covering the conduct of employers and unions or bargaining agents has been accumulated by groups covered under the National Labor Relations Act. Public employees are not covered under this act and at the present time there is no national collective bargaining bill covering public employees.[7] Numerous state laws, however, provide for public employees' collective bargaining. In addition, federal anti-discrimination laws speak directly to the coverage and responsibility of labor organizations in issues related to discrimination.

Generally, it can be stated that it is unlawful for labor organizations:

-- To exclude individuals discriminatorily from union membership, thereby causing them to lose job opportunities.

-- To discriminate in the representation of union members or non-members in collective bargaining, in processing of grievances, or in applying the provisions of an agreement of contract in a discriminatory fashion.

-- To cause or attempt to cause employers to enter into discriminatory agreements or otherwise discriminate against union members or non-members.

Likewise, it may be generally unlawful for employers:

-- To participate with unions in the commission of any discriminatory practices unlawful under these acts.

-- To practice discrimination in a manner which gives rise to racial or other division among employees, to the detriment of organized union activity.

A primary responsibility of any labor organization is that of representation of all groups of the membership. When it can be demonstrated that classes or groups of the membership are not being represented, agreements may be invalid.

Institutional Administrative Policies: In the past decade, many education agencies and institutions have adopted administrative policies which articulate the ideal of equal employment opportunity which is the basis for affirmative action planning and methodology. The experience of agencies and institutions in the implementation of such policies provides a valuable starting point for the effective development of affirmative action plans and efforts.

Such administrative policies have been a point of communication between those responsible for agency or institutional governance and policy formulation and those involved in management and policy implementation. The success of any

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[7]Hearings on a national collective bargaining bill were conducted by the Senate Labor and Public Welfare in the fall of 1974.

affirmative action plan is dependent on the agreement between governance and management as to the need for and purposes of affirmative action and the implications of good faith effort to implement such a plan. Shared experience in the development and institutionalization of equal employment opportunity policies can facilitate this agreement.

Accumulated experience in the implementation of such policies may be significant for several reasons. First, such policies have served to establish a clear action directive for the agency or institution. Second, they also serve as a vehicle for establishing the agency's or institution's credibility as an equal opportunity employer.

Finally, many of the specific learnings that have been acquired through the development and implementation of institutional administrative policies provide information critical for the tailoring of affirmative action efforts to the needs of individual agencies or institutions.

Much of the significance of affirmative action may lie in its potential as a methodology for actualizing the commitments to equality of employment opportunity which now exist in the administrative policies of many education agencies or institutions.

AGENCIES AND ORGANIZATIONAL RESOURCES

The following represent some of the many organizations dealing with human and civil rights. They provide information and services related to their identified areas of concern:

American Civil Liberties Union
22 East 40th Street
New York, New York 10006

Foundation For Equality In Education
3838 Summitview Road
Dublin, Ohio 43017

KEDS General Assistance Center
301 Wright Hall
Kent State University
Kent, Ohio 44242

Mexican American Legal Defense Fund
1730 Rhode Island Avenue, N.W.
Suite #801
Washington, D.C. 20036

National Association for the Advancement of Colored People
200 East 27th Street
New York, New York 10016

National Education Association
Teacher Rights Division
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

NOW Legal Defense and Education Fund, Inc., (PEER)
1029 Vermont Avenue, N.W.
Washington, D.C. 20005

Ohio Education Association
Office of Human Resources
225 E. Broad St. - Box #2550
Columbus, Ohio 43216

Project on the Status & Education of Women
Association of American Colleges
1818 R Street, N.W.
Washington, D.C. 20009

Puerto Rican Legal Defense Fund
815 2nd Avenue
New York, New York 10017

Resource Center on Sex Roles in Education
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Sex Equality in Education (AASA)
1801 North Moore Street
Arlington, Virginia 22209

Sex Equality in Guidance Opportunity
SEGO Project - APGA
1607 New Hampshire Avenue, N.W.
Washington, D.C. 20009

Service Center for Teachers of Asian Studies (OSU)
29 West Woodruff Avenue
Columbus, Ohio 43210

State of Ohio Department of Education
Office of Equal Educational Opportunity
65 South Front St. - Suite 1015
Columbus, Ohio 43215

U.S. Office of Education - HEW
Office of Civil Rights
55 Erieview Plaza - Room 222
Cleveland, Ohio 44114

Women's Law Fund, Inc.
620 Keith Building
1621 Euclid Avenue
Cleveland, Ohio 44115

Women's Project
Center on Law and Social Policy
1751 "N" Street, N.W.
Washington, D. C. 20036

Useful Handouts:
Foundation For Change, Inc.
1841 Broadway - Room 306
New York, New York 10023

Useful Monographs:
Citizens Council for Ohio Schools
517 The Arcade
Cleveland, Ohio 44114